No. 06-7949

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The extraordinary circumstances test is a tale of promises that cannot be kept. Respondent assures that the test does not "inherently" establish an unlawful presumption of unreasonableness for sentences outside the range recommended by the United States Sentencing Guidelines. It declares that, consistent with the Constitution, the test does not require additional factfinding to justify non-Guidelines sentences. And it vouches that the test honors district court discretion and mandates appellate court deference.

The Eighth Circuit's decision, and respondent's own arguments, tell a different story. They confirm that the extraordinary circumstances test presumes all non-Guidelines sentences to be unreasonable unless the district court makes supplemental findings of fact and the court of appeals deems those facts sufficiently "extraordinary" to justify the sentence. This system violates the Sixth Amendment, the Sentencing Reform Act, and this Court's decisions in *Booker* and *Rita*.

Whether a sentence is "reasonable" must turn on *all* of the factors of 18 U.S.C. § 3553(a), and cannot be tethered exclusively to the Guidelines. By its own terms, respondent's version of the test measures the reasonableness of a sentence solely by the benchmark of the Guidelines. The Eighth Circuit relied on this flawed test in overturning the District Court's reasoned judgment that the defendant, who had voluntarily withdrawn from criminal conduct and rehabilitated himself, deserved a lesser punishment than that prescribed in the Guidelines. That decision must be reversed, and the extraordinary circumstances test must be rejected.

I. THE EXTRAORDINARY CIRCUMSTANCES TEST ESTABLISHES AN UNLAWFUL PRESUMPTION OF UNREASONABLENESS.

As respondent concedes, to presume that a sentence is unreasonable merely because it falls outside the range

recommended by the Guidelines is contrary to law. Gov. Br. at 34-35, *Rita* v. *United States*, 127 S. Ct. 2456 (2007) (No. 06-5754). Such a presumption, by forbidding the trial judge from imposing a sentence outside the Guidelines range in the absence of supplemental supporting findings, violates the Sixth Amendment and infringes upon the district court's statutory discretion. See *Rita*, 127 S. Ct. at 2463-67; *United States* v. *Myers*, 439 F.3d 415, 417 (8th Cir. 2006).

The extraordinary circumstances test establishes a presumption of unreasonableness. It holds that a sentence outside the Guidelines range must be reversed unless an adequate, affirmative justification for deviating from that range is provided. *E.g.*, *United States* v. *Davis*, 458 F.3d 491, 496 (6th Cir. 2006), *petition for cert. filed*, No. 06-7784 (U.S. Nov. 13, 2006); *Myers*, 439 F.3d at 417-18. In other words, a non-Guidelines sentence is presumed unreasonable if it is not supported by sufficient evidence to the contrary.[1]

Respondent suggests that the extraordinary circumstances test does not necessarily mandate a finding of "unreasonableness" when a non-Guidelines sentence is unsupported by supplemental findings. Gov. Br. at 15 n.4. But the cases that respondent endorses, see *id.* at 13 & n.3, including the decision of the Eighth Circuit in this case, are to the contrary. Courts applying the test routinely hold that, when a non-Guidelines sentence is not supported by "extraordinary circumstances" (or some other level of additional justification), the sentence must perforce be deemed "unreasonable." See J.A. 129-39 (concluding that the District Court's sentence was "unreasonable" because it was not supported by "extraordinary circumstances"); see also,

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[1] The cases cited in respondent's brief demonstrate that the test requires some level of additional justification for *all* non-Guidelines sentences. *e.g.*, *Davis*, 458 F.3d at 496 ("[T]he farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification [must be]."), not merely those that deviate "dramatically" from the Guidelines range, *see* Gov. Br. at 38.

e.g., *United States* v. *Gillmore*, No. 06-3545, 2007 WL 2317369, at *6 (8th Cir. Aug. 15, 2007) ("[A non-Guidelines sentence] must be accompanied by extraordinary circumstances in order to be reasonable.") (internal quotations omitted). Respondent itself asserts that the purported lack of an "extraordinary" justification for the sentence in this case renders the judgment "unreasonable." Gov. Br. at 44.

Respondent also argues that, even if the test has the appearance of a presumption, it is better viewed as a "judicial frame of mind." *Id.* at 15 n.4. This odd label cannot change the nature of the test. It carries all of the inferences of a presumption: that one result is normally correct (*i.e.*, a non-Guidelines sentence is unreasonable), that the opposing party bears the burden to produce countervailing evidence, and that the favored result controls if such evidence is not offered. See *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 49 n.3 (2003), *cited in Rita*, 127 S. Ct. at 2463. Calling the test a "judicial frame of mind" does not change its inherent character; one may as well speak of a "judicial frame of mind" that a prevailing party in a civil rights case should be awarded attorney's fees, see *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) ("presumption" of fee award), or that a qualified minority employee who is terminated from a position should be deemed to have suffered discrimination, see *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) ("presumption" of discrimination).

Nor is there any merit in respondent's assertion that this Court "recognized" in *Rita* that the extraordinary circumstances test does not establish a presumption of unreasonableness when it "reject[ed] [such] a presumption . . . while reserving (in the same paragraph) the question whether proportionality review is valid." Gov. Br. at 15 n.4. Exactly what the Court "recognized" is open to debate. The opinion's juxtaposition of a presumption of unreasonableness and an extraordinary circumstances test could just as easily have

meant that the latter is a version of the former. In any event, *Rita* does not stand for the proposition cited by respondent.

The extraordinary circumstances test creates a presumption of unreasonableness for non-Guidelines sentences. It must be rejected for that reason.

II. THE EXTRAORDINARY CIRCUMSTANCES TEST MANDATES JUDICIAL FACTFINDING IN VIOLATION OF THE SIXTH AMENDMENT.

Respondent acknowledges that requiring district courts to justify non-Guidelines sentences with additional findings of fact "may create Sixth Amendment difficulties." *Id.* at 35-36 & n.10. It also concedes that several courts of appeals have defined the extraordinary circumstances test in this manner, as demanding a factual justification for non-Guidelines sentences. *Id.* Nevertheless, respondent argues that this factfinding component is not "inherent in proportionality review itself" and that the test, properly construed, contemplates that a district court may vary from the Guidelines range based solely on policy disagreements. *Id.* Because policy judgments may support a non-Guidelines sentence, the argument goes, the test does not mandate factfinding in support of non-Guidelines sentences and does not unconstitutionally limit district court discretion.

This position fails for a number of reasons. First, respondent must take the Eighth Circuit's proportionality analysis as it exists, not as respondent would like it to be. The Eighth Circuit in this case, in accord with the practices of other courts applying the test, overturned the judgment of sentence because the District Court purportedly failed to identify *facts* in support of the sentence. J.A. 139 ("[The sentence] lies outside the limited range of choice dictated by the facts of this case.") (internal quotations omitted); see also Pet. Br. at 16 n.5 (citing cases). Respondent has adopted the same definition in briefs filed in this Court. See Gov. Br. at 36, *Claiborne* v. *United States*, 127 S. Ct. 2245 (2007) (No.

06-5618) ("Gov. *Claiborne* Br.") ("[T]he judge may rely on any facts . . . to justify [an] out-of-Guidelines sentence.").

Only one opinion is cited by respondent in which a court of appeals has suggested that factfinding is not required to justify a non-Guidelines sentence. *United States* v. *Poynter*, 495 F.3d 349, 358-59 (6th Cir. 2007). But that case, like respondent's brief, simply states the proposition without any support and without any examples of its application. *Id.* Indeed, in the very same opinion, reversing an above-Guidelines sentence as unreasonable, the court of appeals suggests that the sentence might have been upheld had the trial judge identified additional aggravating *facts*. *Id.* at 354 ("Consider those who, unlike [defendant], flee the authorities and seek to obstruct their own conviction; those who do not accept responsibility for their actions; those who employ violence or use weapons to commit the offense; and those who stand convicted of a long list of prior sex offenses.").[2]

Moreover, having relied on the supposed availability of policy justifications to save the extraordinary circumstances test, respondent then emphasizes that such justifications can rarely – if ever – support a non-Guidelines sentence. District courts may not, respondent states, base a sentence on policy disagreements with congressional statutes, or even disagreements about perceptions of what Congress wants. Gov. Br. at 37 n.11. Nor may district courts apparently base a sentence on policy disagreements with the Guidelines, unless

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[2] Respondent's argument that the test cannot be viewed as "inherently" mandating factual findings because no court of appeals has "so held," Gov. Br. at 38, overlooks the numerous opinions that have explicitly required *facts* in support of non-Guidelines sentences, *see* Pet. Br. at 16-17, and ignores the reality that the only way "a judge can determine that a case is somehow different from the run of the mine (*i.e.*, 'extraordinary')" – and thereby gain authority to impose a non-Guidelines sentence – is to make findings of fact beyond those in the jury verdict, *see id.* *See also* Br. of Fed. Public & Cmty. Defs. & Nat'l Ass'n of Fed. Defs. at 10-12 ("Defs. Br.") (citing cases reversing sentences because the judge relied on reasons discouraged, prohibited, or not recognized by the Guidelines).

the *facts* of the case provide a basis for distinguishing it from the circumstances contemplated by the Guidelines. See Gov. Br. at 44-45, *United States* v. *Kimbrough*, No. 06-6330 (U.S. Aug. 30, 2007). As for other policy considerations, they are "not entitled to as much deference as . . . fact-based [considerations]." Gov. Br. at 37 n.11. The vaunted discretion of district courts to rely upon policy judgments in sentencing is, in reality, no discretion at all – reducing the number of non-fact based applications of the test to a nullity.

Nor can a district court satisfy the extraordinary circumstances test merely by greater articulation or explanation. Indeed, it would be quite odd if this were the case. Section 3553(c)(2) already mandates that, for sentences outside the range set forth in the Guidelines, the district court state on the record "the specific reason for the imposition of a sentence different from that described." 18 U.S.C. § 3553(c)(2). Courts of appeals would have no cause to invent – and respondent would have no cause to defend – an extraordinary circumstances test if the only effect of that test were to require district courts to provide the explanation already required by § 3553(c)(2). Either the test requires additional findings of fact, and therefore violates the Sixth Amendment, or it is wholly superfluous, and should be rejected as a potential source of confusion and error.

And, even if district courts *could* deviate from the Guidelines through solely policy-based explanations, that power would not cure the constitutional problem. Even then, respondent insists that there would be boundaries inside the statutory maximum and minimum that would restrict sentencing courts' discretion. Gov. Br. at 39-41. These boundaries violate *Apprendi*'s bright-line rule; absent judicially found facts established by a preponderance of evidence, district courts would be forbidden from sentencing beyond those boundaries. See *Rita*, 127 S. Ct. at 2466; see also *id.* at 2475-76 (Scalia, J., concurring in the judgment); see also Br. for Nat'l Ass'n of Criminal Def. Lawyers at 4-16.

Respondent's only reply to this problem is that the system it urges would not create "identifiable" limits on district courts' sentencing authority. Gov. Br. at 40-41. But, instead of avoiding the Sixth Amendment infirmity, this would doubly violate the Constitution. Not only would the federal sentencing system violate defendants' right to a jury trial,[3] but it also would violate their due process right to fair notice. The common law, as well as the Due Process Clause, has always required that a defendant be "ab[le] to predict with certainty" the maximum possible punishment "from the face of the . . . indictment" or criminal statute. *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000); see also *BMW* v. *Gore*, 517 U.S. 559, 574 (1996) ("[O]ur constitutional jurisprudence dictate[s] that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose."). Respondent's proposal flunks that test.

III. THE EXTRAORDINARY CIRCUMSTANCES TEST CONTRAVENES THE SENTENCING REFORM ACT.

The Sentencing Reform Act directs the *sentencing judge* to consider the factors and purposes of § 3553(a) and determine the sentence that is "sufficient but not greater than necessary" to satisfy the purposes of sentencing. *Rita*, 127 S. Ct. at 2467. The district judge has the authority to weigh the various (and sometimes competing) considerations and craft an appropriate sentence based on the individual circumstances of the case. *Id.* at 2462-65. Any restriction that impinges on this authority is contrary to the statute. See *id.*; see also Br. of Families Against Mandatory Minimums at 5-18 ("FAMM Br.") (discussing parsimony and individualized sentencing).

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[3] *See* Pet. Br. at 18 ("Whether the . . . test [applies] to all sentences outside the Guidelines or only to those . . . 'significantly' outside the [range], the result is the same: the court of appeals has imposed an additional factfinding requirement and a limitation on the discretion of the district court to impose a sentence above or below a certain range.").

The extraordinary circumstances test imposes just such a restriction. It tells district courts that they may not impose a sentence outside the range recommended by the Guidelines unless they can present an "extraordinary" justification for doing so. *E.g.*, *United States* v. *Borho*, 485 F.3d 904, 912-16 (6th Cir. 2007). This engrafts onto the statute an additional provision – like the excised subsection (b) – requiring district courts to sentence within the Guidelines in the absence of adequate grounds for a departure. Cf. 18 U.S.C. § 3553(b) (2004) ("[T]he court shall impose a sentence . . . within the [Guidelines] range . . . unless the court finds that there exists [adequate] aggravating or mitigating circumstance[s] . . . ."). In fact, the burden on the district court to justify a non-Guidelines sentence under the test is materially indistinguishable from the burden on the district court to justify a departure under the mandatory Guidelines system, which this Court expressly rejected in *Booker*. See *United States* v. *Booker*, 543 U.S. 220, 259-61 (2005).

The test precludes district courts from complying with the statute in many cases. A district court operating under the test cannot impose a non-Guidelines sentence – even if the court concludes that such a sentence is "sufficient but not greater than necessary" – if the facts of the case are not sufficiently "extraordinary" in the eyes of the appellate court. *E.g.*, *Borho*, 485 F.3d at 912-16; see also J.A. 136-37. Respondent offers no rejoinder to this point, other than to restate its position that "proportionality review does not require an extraordinary justification for all out-of-Guidelines sentences" and "most sentences can be justified as reasonable based on a relatively straightforward explanation." Gov. Br. at 26, 32. But, even assuming *arguendo* that "most sentences" can be upheld without a showing of extraordinary circumstances, but see Pet. Br. at 18, respondent does not dispute that there will be cases in which the test prohibits a district court from imposing the sentence that is "sufficient but not greater than necessary," as the statute mandates. See

Gov. Br. at 21, 26, 31-32; see also Br. of Wash. Legal Found. & Allied Educ. Found. at 19-23 (noting that the Guidelines call for the statutory maximum sentence in many cases).

It is equally difficult to make sense of respondent's claim that the extraordinary circumstances test "promotes a balanced application of the Section 3553(a) factors." Gov. Br. at 14. Emphasis on the Guidelines range as *the only* benchmark is inconsistent with the Court's observation that it is the district court that decides how to weigh the § 3553(a) factors and resolves the inherent tensions and conflicts among them. *Rita*, 127 S. Ct. at 2463. The extraordinary circumstances test not only engrafts a new requirement onto the statute; it imposes a mandate that is inconsistent with the already-balanced structure of the statute and the discretion it plainly affords to sentencing courts. See, *e.g.*, J.A. 136-38.

IV. THE EXTRAORDINARY CIRCUMSTANCES TEST DISTORTS REASONABLENESS REVIEW.

This Court instructed in *Booker* that courts of appeals should review sentences for "reasonableness." 543 U.S. at 259-61. This standard, akin to review for abuse of discretion, asks whether the district court followed all statutory prerequisites and whether the final sentence represents a reasoned and rational exercise of discretionary judgment.[4] See *Rita*, 127 S. Ct. at 2465; see also *id.* at 2472 (Stevens, J.,

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[4] Respondent quibbles over use of the term "rational" to describe reasonableness review. *See* Gov. Br. at 28. This ignores that "reasonable" is often defined as synonymous with "rational," *e.g.*, *Webster's Third New Int'l Dictionary* 1892 (1993), and that this Court has on several occasions linked the terms, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 309 (1993) (a regulation has a "reasonable foundation" if it "rationally pursues" a lawful purpose); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986) (an investment is "rational" if the individual has a "reasonable expectation" of profits). Respondent also seemingly defines reasonableness in terms of rationality: "If the district court's explanation *logically coheres* and is consistent with the totality of the factors, the appellate court upholds the sentence as reasonable." Gov. Br. at 25-26 (emphasis added).

concurring); *Koon* v. *United States*, 518 U.S. 81, 98 (1996). As this Court emphasized in *Rita*, the appellate court owes significant deference to the district court's choice of sentence, wherever it falls in the statutory range. 127 S. Ct. at 2465; *id.* at 2742 (Stevens, J., concurring) ("While reviewing courts may presume that a sentence within the advisory Guidelines is reasonable, appellate judges must still always defer to the . . . judge's individualized sentencing determination.").

Respondent tries to re-argue this point. It asserts that the level of deference owed to the district court's choice of sentence depends upon whether the final sentence is within or without the Guidelines: for those within the Guidelines, the sentence should be upheld in the absence of countervailing considerations; for those outside the Guidelines, the sentence should be reversed in the absence of countervailing considerations. See Gov. Br. at 8; see also J.A. 136-38.

This approach is inconsistent not only with *Booker* but with the very nature of discretion. That a district court has "discretion" with respect to a particular issue means that it may choose among a range of potential results, all of which will be presumed correct by the appellate court. *E.g.*, *Gasperini* v. *Ctr. for Humanities, Inc.*, 149 F.3d 137, 141 (2d Cir. 1998) (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 754 (1982)). See generally Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978). So long as the rationale for the decision "logically coheres" and is consistent with the totality of relevant factors, the court of appeals will affirm. See Gov. Br. at 25-26. To state that less deference is owed to certain decisions is, in effect, to state that the district court lacks discretion to make those decisions and to remove the deferential standard entirely, replacing it with *de novo* review.

The only true "discretion" granted to district courts under the extraordinary circumstances test is to choose a sentence within the Guidelines. Under the test, courts of appeals will not presume sentences outside the Guidelines range to be

correct but will instead presume them to be unreasonable in the absence of facts deemed "extraordinary" by the appellate panel. *E.g.*, J.A. 136-38. And appellate courts will freely second-guess the district courts' weighing of the relevant factors. See, *e.g.*, *United States* v. *Garcia-Lara*, No. 06-3054, 2007 WL 2380991, at *6 (10th Cir. Aug. 22, 2007) ("[A] sentencing court may not accord ordinary facts extraordinary weight."). This is directly contrary to *Booker* and *Rita*, both of which recognized that "appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range . . . or outside that range." *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring); cf. FAMM Br. at 19 ("The presumption of reasonableness upheld in *Rita* is . . . best understood as an example of the larger principle of appellate deference to the district court.") (emphasis omitted).

What respondent proposes is a restoration of a mandatory Guidelines regime, with the only change being that departures will be controlled not by the Guidelines, but by rules crafted by courts of appeals, each of which will assume the functions of a separate and independent sentencing commission. This is not the system that Congress or *Booker* envisioned.

Contrary to respondent's position, the extraordinary circumstances test finds no support in *Williams* v. *United States*, 503 U.S. 193 (1992), in which the Court, interpreting the pre-2003 version of § 3742(f), said that a non-Guidelines sentence should be reversed if the explanation offered by the district court does not "justify the magnitude of the departure [from the presumptive guideline range]." *Id.* at 204. The decision in *Williams* addressed not the appellate standard of "reasonableness" review under subsection (e), but the appellate rules for disposition and decision under subsection (f). See *id.* That discussion therefore cannot inform the interpretation of "reasonableness" under *Booker*, predicated as it was on the pre-2003 version of subsection (e) of § 3742. 543 U.S. at 260. Moreover, even if *Williams* could somehow be construed as addressing reasonableness review more

generally, the decision was premised on the view that the Guidelines were mandatory. 503 U.S. at 198-99. It therefore made sense for the Court to judge "reasonableness" exclusively by reference to the required range established by the Guidelines. *Id.* No longer is this the case. *Booker*, 543 U.S. at 259. The Guidelines no longer serve as the sole benchmark and no longer bind the district court. *Id.* The statements in *Williams* suggesting otherwise are simply inapplicable post-*Booker*. See *Rita*, 127 S. Ct. at 2472 (Stevens, J., concurring) ("After *Booker*, appellate courts are now to assess a district court's exercise of discretion 'with regard to § 3553(a).'") (quoting *Booker*, 543 U.S. at 261).

Respondent acknowledges that the several cases cited in *Booker* as exemplifying "reasonableness" review, addressing sentences imposed under an advisory Guidelines scheme in supervised release revocation proceedings, *e.g.*, *United States* v. *White Face*, 383 F.3d 733, 739 (8th Cir. 2004), do not invoke an "extraordinary circumstances test" or "proportionality doctrine." Gov. Br. at 23 n.6. It offers no explanation for this omission, other than to suggest that "initial federal sentencings . . . implicate more complex sentencing purposes and afford courts greater sentencing options [than revocation proceedings]." *Id.* In fact, there is no meaningful distinction between the purposes, factors, and options at issue in a revocation proceeding and those at issue in an initial sentencing. See 18 U.S.C. § 3583(e). And, even if respondent were correct, this is hardly a reason to accord a different interpretation to the Sentencing Reform Act in the supervised release setting than in others. Nor is it consistent with *Booker*, which instructed that the same form of reasonableness review would apply "across the board." 543 U.S. at 263. If anything, respondent's argument establishes again that the extraordinary circumstances test is in no way moored to the language of the statute.

Respondent misapprehends the nature of reasonableness review when it complains that, without the Guidelines as a

benchmark, "appellate courts would be forced in every case to construct anew the range of reasonable sentences for each particular defendant." Gov. Br. at 18. It is not the job of the court of appeals to "construct" a range of appropriate final sentences. Rather, the appellate court's job is to review the sentence actually imposed by the district court and determine, based on the explanation offered, whether that sentence is reasonable. See *Booker*, 543 U.S. at 259-61; Steven Childress & Martha Davis, *Federal Standards of Review* § 7.06[B][3] (2004). The court of appeals should ensure that the district judge exercised discretion in a rational manner, not decide for itself the appropriate sentence in a given case. *Williams*, 503 U.S. at 205 ("[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.").

This standard does not constitute an "abdication" of appellate review. Gov. Br. at 27. Courts of appeals retain the authority to correct legal error and ensure that the district court abides by the statutory directive to consider all relevant factors and impose the sentence that, in its view, is "sufficient but not greater than necessary." § 3553(a); see also *Koon*, 518 U.S. at 98. They can reverse a sentence when the district court relies on a factor or conclusion that is irrational or irrelevant. *Rita*, 127 S. Ct. at 2472-73 (Stevens, J., concurring); *id.* at 2483 & n.6 (Scalia, J., concurring); see also *Booker*, 543 U.S. at 261; cf. *United States* v. *Valdes*, No. 06-15951, 2007 WL 2700598, at *1 & n.2 (11th Cir. Sept. 18, 2007) (per curiam) (reversing judgment when judge may have increased sentence based on personal bias). They can also overturn a sentence outside the Guidelines range when the district court has not explained why that range did not reflect an appropriate sentence. See § 3553(a)(4), (a)(6), (c)(2); cf. *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1117-18 (10th Cir. 2006) (reversing judgment when judge failed to address defendant's argument for lesser sentence). Far from "abdicating" appellate review, this approach honors and

effectuates the separate roles of the appellate and district courts in the sentencing process.

Nor will this approach result in "the kind of unchecked sentencing discretion that existed in the pre-Guidelines regime." Gov. Br. at 28. The disparities that existed prior to the advent of the Guidelines arose in large part from the lack of standards guiding district courts and the absence of appellate review. See S. Rep. No. 98-225, at 41 & n.143, 65 (1983); see also Norval Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267, 272-74 (1977). Neither of these conditions now exists. The Sentencing Reform Act outlines a series of factors and purposes to guide sentencing courts, including Guidelines that recommend a range of sentences for each offense. The Act also provides for appellate review, allowing courts of appeals to overturn a judgment of sentence if it reflects a failure to weigh all of the factors and purposes of § 3553(a). *Booker*, 543 U.S. at 261. This will prevent different district courts in different parts of the country from unjustifiably applying different sentencing policies to similarly situated defendants. For example, if a single district court treats prior military service as an aggravating factor – when all other courts treat such service as a mitigating factor – the court of appeals may reverse sentences based on that unique judgment if the district court fails to offer a rational explanation for how its treatment of military service considers "the need to avoid unwarranted sentence disparities." § 3553(a)(6). This standard provides courts of appeals with the tools necessary to address unwarranted disparities in the federal system, without the need for an extra-statutory presumption of unreasonableness.[5]

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[5] Advisory guidelines systems, with deferential standards of appellate review, have proven effective in reducing sentencing disparities in the states in which they have been adopted. *See* John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. Rev. 235, 268, 299 (2006); Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, 17 Fed. Sent'g R. 233 (2005).

Moreover, reasonableness review was never intended to ensure mechanistic uniformity in sentencing. *Booker*, 543 U.S. at 263 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure. . . . [b]ut . . . that mandatory system is no longer an open choice."). The Court inferred this standard to promote a balanced application of the Sentencing Reform Act in a manner that respects the Sixth Amendment and allows for a continuing dialogue between district courts and the Sentencing Commission. See *id.* at 261-65; see also *Rita*, 127 S. Ct. at 2463-65. The Court emphasized that achieving this goal requires a deferential standard of review, which permits district courts to exercise discretion in consulting and applying the advisory Guidelines within the general bounds of reasonableness. *Rita*, 127 S. Ct. at 2463-65; see *id.* at 2472-74 (Stevens, J., concurring); *id.* at 2482-83 (Scalia, J., concurring in the judgment); cf. Defs. Br. at 3-29 (arguing that deferential review is necessary to foster dialogue between district courts and the Commission).

Respondent repeatedly challenges petitioner to define what the "reasonableness" standard means. Gov. Br. at 10, 28-29; see also Gov. *Claiborne* Br. at 29-30. But this Court has already answered that challenge. The opinion in *Rita* demonstrates that, on review for reasonableness, appellate courts should focus on the reasons offered by the district court to determine if the final sentence, whether it falls within or without the Guidelines range, represents an abuse of discretion. 127 S. Ct. at 2465, 2468-70. Any further attempt by respondent or the courts of appeals to engraft onto this standard an additional test or rule that is fact-driven, Guidelines-centric, and sufficiently vague to give appellate courts ample chance to second-guess the reasoned judgments of district courts necessarily runs afoul of the Court's Sixth Amendment holdings in *Blakely*, *Booker*, and *Cunningham*.

Respondent's oft-expressed concerns about uncontrolled sentencing disparities stemming from powerlessness in the

courts of appeals are overblown. Sentencing must still be rationally grounded in the factors of § 3553(a), see *Booker*, 543 U.S. at 260-61, the reasons offered by the district court must logically cohere, see *Koon*, 518 U.S. at 101-12, and those reasons must fit the facts of the case, see *Rita*, 127 S. Ct. at 2470. And, although respondent decries a supposed 48.6% increase in non-Guidelines sentences since *Booker*, see Gov. Br. at 42-43, the percentage of non-Guidelines sentences remains low at 13.9%, only 2.5% higher than in the pre-PROTECT Act years, see *id.* at 31a.[6] If, despite access to a "generation's worth" of Guidelines wisdom and to legal databases containing the opinions of their colleagues around the country, sentencing judges were to somehow return to pre-1984 practices, then Congress can reduce sentencing court discretion in a number of ways consonant with the Sixth Amendment. Respondent's proposed rule, however, seeks only a return to the familiar – "soft constraints" on a presumptive Guidelines system that is not materially different (except for its judicial rather than legislative origins) than the sentencing schemes struck down in *Blakely*, *Booker*, and *Cunningham*. Although it is keen strategy for respondent to repeatedly ask that the problem be solved in its own way, it is patent that respondent's way does not conform with Sixth Amendment principles.

The extraordinary circumstances test will, moreover, give rise to greater uncertainty and confusion in the federal system. Neither respondent nor the courts of appeals have defined the test in a manner that would allow for objective application. The Eighth Circuit has said that an "extraordinary variance" requires "extraordinary circumstances" while lesser variances require an "appropriate" justification. J.A. 136-38. The Tenth Circuit has stated that an "extreme" variance must be supported by a "dramatic" justification, a "substantial"

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[6] Petitioner cannot confirm the accuracy of respondent's statistics because the underlying data is, at least in part, not available to the public. It was apparently provided to respondent by the Sentencing Commission.

variance must be supported by a "compelling" justification, and a "significant" variance must be supported by a "sufficient" justification. *United States* v. *Hildreth*, 485 F.3d 1120, 1127-28 (10th Cir. 2007). The Sixth Circuit has suggested that a "little" variance requires only a "little" justification. *Poynter*, 495 F.3d at 357; cf. *United States* v. *Wallace*, 458 F.3d 606, 614 (7th Cir. 2006) (stating that a "World Series" variance requires a "World Series" justification), *petition for cert. filed*, No. 06-7779 (U.S. Nov. 13, 2006). These statements are nothing more than sloganeering, devoid of substantive content and of little value to courts trying to apply the test. Cf. Arg. Tr. at 43, *Claiborne*, 127 S. Ct. 2245 (No. 06-5618) (noting that the "extraordinary circumstance" test "sounds like a slogan") (Breyer, J.). None of them explains objectively when a variance is so substantial as to require further justification or the level of justification necessary to support such a variance.[7] Cf. Br. for the N.Y. Council of Def. Lawyers at 5-8 ("NYCDL Br.") (discussing inconsistent application of the test, and tendency of circuit courts to affirm above-Guidelines sentences and reverse below-Guidelines sentences).

The sole manner to assure effective and consistent appellate review, in accordance with *Booker* and *Rita*, is to require that courts of appeals focus on the reasons offered by the district court. Only if those reasons do not rationally support the final sentence in light of the statutory prerequisites should the appellate court overturn the sentence.

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[7] Nor does respondent offer any workable standard. It states that, in measuring the degree of variance for purposes of applying the test, "courts should not focus solely on the percentage deviation from the Guidelines range" but should consider "all relevant measures of the extent of a variance – including percentage, absolute time, and any difference in the nature of the punishment." Gov. Br. at 44 n.15. How this collection of conflicting and ambiguous measures will lend any greater certainty or consistency to the sentencing process is unclear.

V. THE DISTRICT COURT'S CHOICE OF SENTENCE IN THIS CASE WAS REASONABLE.

The sentence imposed in this case was reasonable. The District Court conducted a lengthy sentencing hearing, heard arguments by both parties concerning the factors and purposes relevant to sentencing, and issued a detailed memorandum explaining the rationale for the final sentence. J.A. 60-127. Neither respondent nor the court of appeals has identified any cognizable legal or factual error underlying the judgment or suggested that the District Court's reasoning does not "logically cohere." Gov. Br. at 25. Indeed, respondent concedes that the factors upon which the District Court relied "were appropriate considerations under Section 3553(a)" and "could reasonably have [supported] . . . a sentence below the Guidelines range." *Id.* at 45. Respondent – as did the Eighth Circuit – simply disagrees with the District Court's judgment that a sentence of three years' probation is warranted.

This disagreement is not a valid reason to overturn the judgment. Appellate review for abuse of discretion should address itself primarily to the rationale, not the result. Childress & Davis, *supra*, § 7.06[B][3]; see Friendly, *supra*, at 754. An appellate court must affirm a sentence, even one it would not have itself imposed, so long as the district court offered a reasonable and rational justification for the judgment. See *Rita*, 127 S. Ct. at 2465; *Koon*, 518 U.S. at 98. Respondent makes no argument that the District Court in this case failed to provide a rational explanation for its decision.

Nevertheless, respondent tries its best to recharacterize Mr. Gall as a recidivist felon, deserving of a significant term of imprisonment. It paints him as a devious and shrewd criminal operator who was able to exploit a drug distribution scheme and then escape when the police got too close. Gov. Br. at 45-50. Quite a different picture emerges from a reading of the District Court record and opinion: Mr. Gall was a college student, prone to addiction, who got caught up with the wrong

people, made some serious mistakes, but recognized his errors and voluntarily rehabilitated himself. See, *e.g.*, J.A. 97-101. To the extent respondent argues otherwise, it runs counter to the record and the findings of the District Court.[8]

Respondent also argues that the sentence imposed in this case is "the most lenient sentence available" and, as such, should be "reserved [only] for cases that warrant [such a] punishment." Gov. Br. at 45. Ignoring the fact that the sentence imposed was *not* the most lenient one available (for example, a lesser term of probation or fewer conditions of release could have ordered), it is absurd to suggest that a district court may not impose a sentence near the end of the statutory range simply because a "better" defendant may someday be convicted of a similar crime. This standard would preclude courts from ever assessing a non-Guidelines sentence, since one can always hypothesize a more sympathetic defendant. Indeed, the "perfect" defendant, who would presumably deserve the most lenient sentence, will likely never appear before a court because that defendant would likely never be indicted: for example, the "perfect" defendant that respondent imagines in this case – one who turned himself into authorities immediately upon renunciation of the scheme, see *id.* at 46 – may not have been prosecuted at all under the standards set forth in the United States

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[8] Respondent alleges that Mr. Gall withdrew from the conspiracy because "he was very nervous that [Theodore Sauerberg] was telling too many people about the business." Gov. Br. at 3. Although investigating officers reported that Mr. Rinderknecht said as much, Mr. Gall indicated that he had withdrawn in order to concentrate on his collegiate studies. Sealed J.A. 148-52. Moreover, other individuals recalled that Mr. Sauerberg had moved to Spain in July 2000, more than a month *before* Mr. Gall left the conspiracy. *Id.* The District Court did not explicitly resolve this conflict but suggested, by finding that Mr. Gall "voluntarily . . . withdrew from the conspiracy," that it credited Mr. Gall's version of events. J.A. 123. Whatever the case, the District Court did not adopt the self-interested account of Mr. Rinderknecht, on which respondent now belatedly relies.

Attorney's Manual. See *U.S. Attorney's Manual* §§ 9-27.200 to 9-27.270, 9-27.600 to 9-27.630 (2007).

The District Court considered all of the factors of § 3553(a), including the need to avoid unwarranted sentencing disparities and to promote general deterrence. It acknowledged the need to avoid unwarranted disparities, see J.A. 119, but adjudged this disparity a warranted one and gave specific reasons that "logically cohere" and are "consistent with the totality of the factors." See Gov. Br. at 25-26. It also explained that, because Mr. Gall had voluntarily withdrawn from the conspiracy and rehabilitated himself, a sentence of imprisonment would promote "not respect but derision of the law." J.A. 124-26; see NYCDL Br. at 9-21 (discussing the penological value of probation). This suggests that, in the District Court's view, a sentence of imprisonment would not serve the purpose of general deterrence because it would signal to others that renunciation of criminal activities offers no benefit in terms of a reduced sentence, when compared to those who persist in criminal conduct. More importantly, the record as a whole – which, as this Court said in *Rita*, must be considered in assessing whether a district court honored its obligations under § 3553(a), see 127 S. Ct. at 2468-69 – shows that the District Court understood the need to address unwarranted disparities and general deterrence and accepted the parties' arguments concerning these and other factors. See J.A. 92, 97.

No error has been identified in the District Court's judgment that would render the sentence unreasonable. Notwithstanding the Eighth Circuit's disagreement with the outcome, the District Court's rationale and final sentence were reasonable, and the sentence should have been affirmed.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals for the Eighth Circuit and remand with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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